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No. 88-293 (12)

In The

Supreme Court of the United States

October Term, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

v.

JAMES EARL REID,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether, under the "work made for hire" provision of the Copyright Act of 1976, 17 U.S.C. Sections 101 and 201(b), a commissioning party of a work can, through the exercise of supervision and direction of the work's creator, change the status of that creator from an independent contractor/artist to that of the party's "employee" without his knowledge and against his wishes, thereby taking from the creator all rights in the work.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.

2. Respondent is James Earl Reid.

3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.

4. The Copyright Justice Coalition, an ad hoc group of some fifty organizations, filed an *amicus curiae* brief in the Court of Appeals in support of Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

I. Statement of Facts 1

A. Commissioning of the Sculpture 1

B. Creation of the Sculpture 1

C. The Aftermath 4

II. Proceedings Below 5

A. The District Court 5

B. The Court of Appeals 6

INTRODUCTION AND SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. The *Aldon* "Supervision and Direction" Test Lacks Predictability, Violates the Rules of Statutory Construction, Has Been Rejected By Legal Scholars, And Is Not Supported By Legislative History 11

A. Utilization Of The After-The-Fact *Aldon Accessories* Test Forces The Parties To Negotiate A Contract Without Being Able To Predict Accurately What Their Relationship To One Another Ultimately Will Be 11

B. The *Aldon* Test Violates The Rules of Statutory Construction 15

TABLE OF CONTENTS–Continued

Page

1. One Should Interpret A Statute According To Its Ordinary Meaning 15

2. Every Word In The Statute Should Be Given Effect 16

C. The *Aldon* Test Has Been Overwhelmingly Rejected By The Vast Majority of Scholars 17

D. The *Aldon* Test Permits Several Outcomes Which Are Antithetical To The Intentions Of The Statute's Framers And Would-Be Contracting Parties..... 19

1. The *Aldon* Test Violates the Idea/Expression Dichotomy Of The Copyright Law 19

2. Works Created By Traditional Salaried Employees Could Be Deemed Not Works For Hire 21

E. Summary..... 22

II. Treatment Of The Term, "Employee Within The Scope Of His Or Her Employment," As Meaning A Regular Salaried Employee Is Supported By The Ninth Circuit, The U.S. Copyright Office, And Most Scholarly Commentary, And Comports With Rules Of Statutory Construction And With The Legislative History Of The 1976 Copyright Act. 23

TABLE OF CONTENTS–Continued

Page

A. The Court Of Appeals For The Ninth Circuit, Which Provides The Most Recent Opinion On The Work For Hire Issue, Joins The Federal Government And Voluminous Scholarly Commentary In Finding Section 101(1) Refers Only To Formal, Salaried Employees .. 23

B. Under The Rules Of Statutory Construction, Ordinary Words In a Statute Are Given Their Ordinary Meaning; Therefore, The Word, "Employee," Which Appears In Section 101(1) Of The 1976 Copyright Act, Means A Salaried Worker 28

C. The Legislative History Of The 1976 Copyright Act Makes It Clear That Participants In The 20-Year Revision Process Assumed The Term, "Employee," Meant A Regular, Salaried Worker 30

D. Respondent Reid Was Never A Salaried Employee Of The Community For Creative Non-Violence, Nor Was His Sculpture One Of The Types Of Commissioned Works That Can Be A Work For Hire..... 37

TABLE OF CONTENTS–Continued

Page

III. The *Dumas* "Formal, Salaried Employee" Test Provides Predictability And Is Supported By Rules Of Statutory Construction And By The Legislative History Of The 1976 Act; However, If This Court Does Not Embrace *Dumas*, The *Easter Seal* Agency Test Provides Far More Predictability Than The *Aldon* "Supervision And Direction" Test And Is Not Offensive To Statutory Construction Or The Legislative History, As The *Aldon* Test Is 38

A. The *Easter Seal* Test Provides Greater Predictability Than The After-The-Fact Aldon Test 39

B. The Legislative History Supports The *Easter Seal* Court's Finding That Congress Intended To Broaden The Rights Of Creators In Enacting Section 101(1) and (2) 42

C. The *Easter Seal* Test Provides A Logical Distinction Between Section 101's Subsections (1) and (2) And Provides A "Moral Symmetry" 43

IV. No Remand To The District Court Is Necessary To Determine Whether Reid Was An Employee Under Agency Law Because The Undisputed Facts, As Found By The District Court, Admit Of No Other Conclusion 44

V. CCNV's Argument Regarding Joint Authorship Is Not Before The Court 46

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES:

Aaron v. Securities and Exchange Commission, 446 U.S. 680 (1980) 30

Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., 542 F. Supp. 252 (D. Neb. 1982) 20

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Altman v. New Haven Union Co., 254 Fed. 113 (D.C. Conn. 1918) 36

Anderson v. Black & Decker (U.S.), Inc., 597 F. Supp. 1298 (E.D. Ky. 1984) 15

Baker v. Selden, 101 U.S. 99 (1879) 20

Brastex Corp. v. Allen International, Inc., 702 F.2d 326 (2d Cir. 1983) 15

Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565 (2nd Cir. 1966) 37

Caminetti v. U.S., 242 U.S. 470 (1961) 15

Community for Creative Non-Violence v. Reid, 652 F. Supp. 1453 (D.D.C. 1987) ..... *passim*

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TABLE OF AUTHORITIES–Continued

Page

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Hoehling v. Universal Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) 20

ICC Industries, Inc. v. U.S., 812 F.2d 694 (CA Fed. 1987) 22

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974). 45, 46

Kenbrooke Fabrics, Inc. v. Material Things, 223 U.S.P.Q. 1039 (S.D.N.Y. 1984) 20

King v. Alaska State Housing Authority, 633 P.2d 256 (Alaska 1981) 16

Malat v. Riddell, 383 U.S. 569 (1966) 28

Mazer v. Stein, 347 U.S. 201 (1954) 20

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Murray v. Gelderman, 556 F.2d 1307 (5th Cir. 1978) 37

NLRB v. Amax Coal Co., 453 U.S. 322 (1981), *reh'g denied*, 453 U.S. 950 28

NLRB v. Hearst Publications, 322 U.S. 111 (1944) 29

Office of Consumers Counsel, State of Ohio v. Federal Energy Regulatory Commission, 783 F.2d 206 (D.C. Cir. 1986) 16

Perrin v. United States, 444 U.S. 37 (1979) 29

Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) 37

TABLE OF AUTHORITIES–Continued

Page

Pullman-Standard, A Division Of Pullman, Inc. v. Swint, 456 U.S. 273 (1982) 44, 45, 46

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) 15

Siegel v. National Periodical Publications, Inc., 508 F.2d 909 (2d Cir. 1974) 37

Teel v. American Steel Foundries, 529 F. Supp. 337 (E.D. Mo. 1981) 15

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United States v. Bayko, 774 F.2d 516 (1st Cir. 1985) 29

U.S. v. Menasche, 348 U.S. 528 (1955) 16

U.S. v. Pennsylvania Environmental Hearing Board, 584 F.2d 1273 (3d Cir. 1978) 15

Yardley v. Houghton Mifflin Co., Inc., 108 F.2d 28 (2d Cir. 1939) 36, 41

CONSTITUTION AND STATUTES:

Copyright Act of 1976, 17 U.S.C. Section 101(1) *et seq.* ..... *passim*

Section 101 (1) and (2) ..... *passim*

Section 102(a) 20

Section 201 11

Section 201(b) 8

Section 204 32

17 U.S.C. Section 1 *et seq.* (1970) ..... *passim*

TABLE OF AUTHORITIES–Continued

Page

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Copyright Law Revision, Part I, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1961 31

Copyright Law Revision, Part 2, Discussion and Comments on Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, February 1963, 88th Cong. 1st Sess. 32, 34

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Hearing Before the Subcommittee on Patents, Trademarks, and Copyright of the Committee of the Judiciary, U.S. Senate, 89th Congress, 1st Sess., August 1965 35

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TABLE OF AUTHORITIES–Continued

Page

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TABLE OF AUTHORITIES–Continued

Page

LEGISLATIVE MATERIALS:

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Copyright Law Revision, Part 2, Discussion and Comments on Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, February 1963, 88th Cong. 1st Sess. 32, 34

Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft, 1964 ..... 33, 34

Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments, 89th Cong., 1st Sess. 1965 31

G. S. Grossman, *Omnibus Copyright Revision Legislative History*, 1976 ..... 22, 32

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H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 32

H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1965) 33

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TABLE OF AUTHORITIES–Continued

Page

MISCELLANEOUS:

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Goldberg, *Works Made for Hire – A Copyright Quagmire*, N.Y.L.J., March 20, 1987 17

Hamilton, *Commissioned Works as Works made For Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281 (1987) ..... *passim*

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Latman, R. Gorman, & J. Ginsburg, *Copyright For The Eighties: Cases and Materials* 242 (1985) 42

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TABLE OF AUTHORITIES–Continued

Page

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The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976, 62 N.Y.U. L. Rev. 373, 389 (1987) 19, 27

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Webster's New World Dictionary, Second College Edition (1972) 28

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Commissioning Of The Sculpture

In the latter part of October 1985, James Earl Reid, a Baltimore, Maryland sculptor, received two phone calls from Mitch Snyder of CCNV, in Washington, D.C. Over the course of their conversations, Reid and Snyder reached an agreement whereby CCNV commissioned Reid to create a "contemporary nativity scene" to be placed at the Pageant of Peace in Washington in December. Transcript of trial before the District Court, February 3, 1987, at pages 224-25, Reid testifying.[1] The statue was to depict a homeless black family huddled over a steam grate. *CCNV v. Reid*, 652 F.Supp. 1453, 1455 (D.D.C. 1987).

Reid decided to donate his services to this "worthy cause." 2/2/87 Tr. 146 (Reid). He estimated that the costs of production of the sculpture would be $12,000.00 to $15,000.00. 2/3/87 Tr. 155-56 (Reid). Snyder agreed to reimburse Reid's expenses. 2/2/87 Tr. 22 (Snyder). (CCNV ultimately paid Reid a total of $15,000.00). *CCNV*, 652 F. Supp. at 1455. Because of the time and money constraints facing CCNV, Reid decided to cast the sculpture in "Design Cast 62," rather than in the much more expensive and time-consuming bronze he normally uses. 2/3/87 Tr. 147 (Reid).

B. Creation Of The Sculpture

Reid immediately began work on the project. *CCNV*, 652 F. Supp. at 1455. (App. 31a). He hired a total of

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[1] Hereinafter, cited in abbreviated form, e.g., 2/3/87 Tr. 224-25 (Reid).

perhaps 12 workers to help him with the menial tasks and mechanical aspects of creating the sculpture. Reid planned their schedules, paid them, and supervised their work. 2/3/87 Tr. 189-90 (Reid).

Reid also began to develop the concept and mood for the sculpture. 2/3/87 Tr. 160 (Reid). He described the research phase to develop the artistic concept as a "search-and-discovery," as an evolving concept that takes on a life of its own. 2/3/87 Tr. 162 (Reid). He began by sketching models in various poses. *CCNV*, 652 F. Supp. at 1455 (App. 31a). At Snyder's request, Reid sent him one of the sketches to be used to help raise funds to pay for the statue.

At this time Reid visited Washington's homeless community; at Reid's request, Snyder arranged for him to meet a homeless black family that could serve as models for the nativity scene. After meeting the family, Reid rejected the parents as artistically unsuitable for the figures of Joseph and Mary, but approved of the couple's baby as the model for the Christ Child. Reid also observed homeless people on steam grates, including an elderly black woman sitting on a grate with a shopping cart, and in other "habitats." 2/3/87 Tr. 168-170, 211 (Reid).

In early November, Snyder and other CCNV members toured Reid's studio in Baltimore. 2/3/87 Tr. 172 (Reid). It was there that the title of the sculpture ("Third World America" with the legend, "and still there is no room at the inn") and the idea of the steam grate as a pedestal were discussed. 2/3/87 Tr. 174-5 (Reid).

It was decided that CCNV would use Reid's details and measurements to have the statue's base constructed by an outside firm at a cost of $7,000-$8,000. 2/3/87 Tr. 176, 177 (Reid); *CCNV*, 652 F. Supp. at 1455. Reid then provided a design showing the proportions of the grate and indicating where the sculpture would be attached to it. 2/3/87 Tr. 197 (Reid).

Reid continued to develop his concept for the sculpture, photographing the models he had selected in various poses. Throughout the seven-week period of creation, in fact, Reid "went through decisions as to what would be the final compositional state . . . for the effective completion of my composition and design." 2/3/87 Tr. 211 (Reid). Reid then completed the armature, or underwiring, for the sculpture, applied the first layer of clay, and began the first rendering, or specific shaping of the muscles of the figures.

In early December, Reid undertook the final rendering of his sculpture.[2] 2/3/87 Tr. 197 (Reid). The sculpture that evolved over the seven weeks is a complex piece of original art.

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[2] At this time Reid applied his copyright notice to the statue. All details that appear in the cast form of a statue have to be in the final clay rendering, from which the casting mold is made. 2/3/87 Tr. 201 (Reid). Reid's employee, artist Tom Lewis, who testified that he was in continual communication with CCNV "for the approval of the work," 2/2/87 Tr. 122 (Lewis), apparently did not relay word of the copyright notice to CCNV. *See*, 2/2/87 Tr. 125 (Lewis). Nonetheless, the District Court found that Reid claimed copyright ownership for the first time on December 24, 1985, the day the sculpture went on public display. *CCNV*, 652 F. Supp. at 1455 (App. 33a).

By December 12, 1985, all that remained to be done was the actual casting of the work. On that date, Reid received a phone call from Snyder, who demanded that the statue be delivered at once. Reid explained that the art work would be destroyed if the process were rushed at this stage. Snyder, a short time later, called Reid again and told him to take the necessary time to do a "first class work." *CCNV*, 652 F. Supp. at 1455 (App. 33a). This Reid did, and when he believed it was complete, delivered the sculpture, marked with a copyright notice in his name, to the Ellipse on December 24, 1985. *Id.*[3]

C. The Aftermath

Pageant officials rejected the sculpture because of its political message, so the work was placed on a nearby site, where it remained for a month. *CCNV*, 652 F. Supp. at 1455 n. 6, 1456 (App. 33a). It was then returned to Reid's studio so Reid could repair some damage it had sustained while being transported to Washington, D.C. *Id.* at 1456.

On February 13, 1986, CCNV members and Reid, accompanied by three other persons, met in Washington to discuss the future of the work. Snyder proposed a multi-city tour of the work to promote the cause of the homeless. Reid proposed that, given the evident fragility of the work, the statue be cast in bronze, or in the alternative, that a rubber master mold be made from which new castings could be made. 2/3/87 Tr. 217-18

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[3] Reid filed a copyright registration in his name with the Copyright Office of the Library of Congress on March 20, 1986.

(Reid). Snyder said CCNV would not spend any more money on the statue, but that Reid could do so if he wished. *CCNV*, 652 F. Supp. at 1456 (App. 33a).

Within the month, Snyder telephoned Reid to ask that the sculpture be given to CCNV right away. Reid refused to return the piece; he feared for its survival if it were sent on the tour suggested by Snyder. 2/3/87 Tr. 238 (Reid). As a result of this refusal, CCNV filed its Copyright Registration on May 21, 1986, and then sought, and received, a preliminary injunction placing the statue in its possession in July 1986. *Id.* at 1456.

II. PROCEEDINGS BELOW

A. The District Court

In June 1986, CCNV filed suit in U.S. District Court for the District of Columbia seeking the return of the sculpture from its creator, Reid, and a decision as to whether Reid or CCNV, the commissioner of the work, owned the copyright in the sculpture. On July 25, 1986, the District Court granted CCNV a preliminary injunction requiring Reid to return the statue to CCNV.

In a subsequent two-day bench trial the District Court was asked to determine copyright ownership based on the "work made for hire"[4] doctrine of the 1976 Copyright Act.[5] From the outset of the litigation Reid has maintained that he was never an employee of CCNV.

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[4] Hereinafter, "work for hire."

[5] Copyright Act of 1976, 17 U.S.C. Section 101 *et seq.* (1982 & 1986 Supp. IV).

CCNV v. Reid, 846 F.2d 1485, 1492 n.10 (D.C. Cir. 1988) (App. 14a). However, the District Court, in a decision dated February 9, 1987, adopted the "direction and supervision" test used by the Second Circuit (*Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)) to find that Reid was an employee of CCNV, on the grounds that CCNV conceived the idea of the statue in specific detail, that CCNV had hired Reid for his representational skills rather than his artistic ability, and that CCNV made the last payment for the production costs of the statue only when they found the statue conveyed the message they wished. *CCNV*, 652 F. Supp. 1453, 1456-57 (1987) (App. 35a).

Thus, the District Court found, CCNV, as the "employer" of Reid, owned the copyright in the statue. *CCNV*, 652 F. Supp. at 1457 (App. 36a). Reid filed a timely notice of appeal on March 11, 1987.

B. The Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit reversed the District Court and remanded the case for further proceedings on matters not at issue here. *CCNV*, 846 F.2d 1485. The court adopted the Fifth Circuit's agency law test to determine employment status as set forth in *Easter Seal Society for Crippled Children and Adults of Louisiana v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1280, 99 L.Ed. 2d 491 (1988). The court agreed with the Fifth Circuit's view that the distinction Congress made between "employment" in Section 101(1) and "commissioned" work in Section 101(2) meant that the work of an

independent contractor can be a work for hire only if it is among the enumerated categories in Section 101(2) and only then if the parties agree in writing. *CCNV*, 846 F.2d at 1489. (App. 7a). The Fifth Circuit, in what it called the "literal interpretation" emphasized the "dichotomy in fact between employees and independent contractors." *CCNV*, 846 F.2d at 1492 (App.13a), quoting *Easter Seal*, 815 F.2d at 329. Under the Fifth Circuit's scenario, the employment status of a seller of a copyrightable work first would be determined by agency law, then Section 101 would be applied. *Id.*

Although the Fifth Circuit opinion had not yet issued at the time of the District Court's decision, the Court of Appeals noted that "Reid had in fact tendered to the district court an alternate position on all fours with the one thereafter enunciated" in *Easter Seal*, 846 F. 2d at 1498 n. 10. From the beginning of the litigation, Reid had maintained that he was never an employee of CCNV and that his sculpture was not within the nine categories of Section 101(2). *Id.*

The Court of Appeals below also noted with approval the scholarly commentary on the legislative history and its "almost unanimous support" for the view that the two sections of the work for hire definition are separate and distinct. *CCNV*, 846 F.2d at 1492. (App. 15a).

CCNV filed a petition for certiorari to this Court on August 17, 1988. It was granted on November 7, 1988.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals below correctly held that the copyrightable work of an independent contractor cannot be a work for hire under Section 201(b) of the 1976 Act unless that work falls within one of the specific categories enumerated in Section 101(2) and the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire. 17 U.S.C. Section 101(2). The Court also properly concluded that the subject, "Third World America" does not qualify as a work for hire because Reid was an independent contractor/artist and not a CCNV employee under Section 101(1), the sculpture is not among the nine categories enumerated in Section 101(2), and, finally, there was no written agreement between CCNV and Reid.

CCNV concedes that it has no access to the copyright of the sculpture under the "specially ordered or commissioned" work provisions of subdivision (2) of Section 101. Therefore, it must argue, as it does, that Reid was an actual employee of CCNV and created the sculpture in "the course of his employment".

Clearly when CCNV's Snyder and Reid met for the first time by telephone in late October 1985, Reid was not CCNV's employee under any standard. Reid was an independent artist and CCNV commissioned him to create a sculpture for the Pageant of Peace on the Ellipse in December. CCNV claims, as it must in order to prevail, that action taken by it somewhere along the line transformed Reid from an independent contractor into a CCNV employee and his work into a work for hire. CCNV claims that without Reid's knowledge and against

his wishes, he became a CCNV employee. Reid claims he continued in his independent contractor role and never became such an employee.

CCNV urges this Court to reverse the Court of Appeals and accept a "test" specifically rejected by the Fifth, Ninth, and District of Columbia Federal Circuits. Under CCNV's test the commissioning party can claim, as it did here, for the first time after the artist finishes his work, that some degree of supervision and direction by that commissioning party makes the work one "for hire" under the Act. Reid respectfully suggests that CCNV's test should be rejected by this Court for the same reason that it has been rejected by three Federal Circuit Courts: it is virtually impossible for the parties to a commissioned work to accurately predict what their relationship to one another will be and how it will change between the time the creative process begins and the time it ends. Not only does CCNV's so-called "supervision and direction" test rob from the negotiations all sense of predictability and place the power to change the relationship solely in the commissioning party's hands, it also violates accepted rules of statutory construction and contravenes the letter and spirit of twenty years of legislative history while gathering almost no support among scholars.

The Court of Appeals relied upon the doctrine of the law of agency, as did the Fifth Circuit, to find first that Reid was not an agency law employee and the work, accordingly, was not a work for hire. The Circuit Court had a fully-developed, uncontested factual record before it in ruling that under the agency law test it had found to be appropriate, Reid was not CCNV's employee. This is the only result which can be supported by this record.

Accordingly, should this Court find that the Fifth Circuit's agency law approach is appropriate, CCNV's request for a remand must be denied.

Reid suggests that the approach taken recently in the Ninth Circuit, an approach urged upon this Court by the United States Copyright Office, as amicus, most properly addresses the Copyright Act's work for hire provisions. Under the Ninth Circuit approach, which enjoys the support of most scholarly reviews, as well as comporting with the Act's legislative history, an individual is an "employee" for the purposes of Section 101(1) if he or she works for the commissioning party as a regular salaried employee. Under this straightforward approach, parties on both sides of commissioned or contracted-for work know with solid predictability what their relationship is and will be: if the individual is a formal, salaried employee his or her work will be a work for hire and the employer will be deemed the "author" of the work and the owner of its copyright. If a formal, salaried employment relationship is not present and the work is not governed by subdivision (2) with a signed agreement, then the work is simply not a work for hire. Certainly, should the Court find that the Ninth Circuit approach is appropriate then remand to the District Court would be inappropriate because neither party claims that Reid was ever in such a relationship with CCNV.

CCNV argues that the Court of Appeals' opinion produces negative fallout in the form of "fractionalization" of the copyright where more than one party potentially holds a valid claim to a copyright. As CCNV points out, they will pursue that issue on remand and it is not before this Court.

However, Reid must point out the hypocritical nature of CCNV's argument, which is that only commissioning parties can question the parties' relationship once the creative process is underway. CCNV urges a completely after-the-fact review that would strip Reid of all copyright ownership, on the one hand, and decrys as too disruptive a system where joint authors can be found to exist. As with the remainder of their argument, this argument must be rejected.

ARGUMENT

I. THE *ALDON* "SUPERVISION AND DIRECTION" TEST LACKS PREDICTABILITY, VIOLATES THE RULES OF STATUTORY CONSTRUCTION, HAS BEEN REJECTED BY LEGAL SCHOLARS, AND IS NOT SUPPORTED BY LEGISLATIVE HISTORY

A. Utilization Of The After-The-Fact *Aldon Accessories* Test Forces The Parties To Negotiate A Contract Without Being Able To Predict Accurately What Their Relationship To One Another Ultimately Will Be

The Second Circuit in *Aldon Accessories Ltd. v. Speigel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984), ruled in a contested copyright case that where the commissioning party to a work exercises enough direction and supervision over an artist during the creation of a work, that artist becomes an employee of the commissioning party, and the work a "work for hire" with the copyright belonging to the "employer" for purposes of Section 201 of the Copyright Act of 1976. The approach utilized in *Aldon Accessories*, which is urged upon this Court by CCNV as the *Aldon* test, has been rejected

emphatically by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 469 U.S. 982 (1984), by the District of Columbia Circuit Court in *CCNV v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), and most recently by the Ninth Circuit in *Dumas v. Gommerman*, 89 Daily Journal D.A.R. 501 (9th Cir. 1989). Reid suggests that the *Aldon* test, which thwarts the ability of parties to negotiate contracts with the firm knowledge of what their relationship will be at the end of the creation period, improperly permits the commissioning party unilaterally to change the artist's status from independent artist/ contractor to employee.

In rejecting the *Aldon* direction and supervision approach the court below and the Fifth Circuit in *Easter Seal* each noted that the *Aldon* opinion was based upon an extreme set of facts.[6]

Reid respectfully argues that the court below correctly rejected the *Aldon* test in ruling that the "Third World America" statue does not qualify as a work for hire

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[6] The Court below viewed the *Aldon* facts as follows: "We pause here to observe that unlike the instant case, in which artists and commissioning parties vie for ownership of a copyright, *Aldon Accessories* pitted the commissioning party (to boot, a genuinely creative participant) against a third-party infringer (and a blatant one at that)." *CCNV*, 846 F.2d at 1490. (App. 10a).

. . . [T]he *Aldon Accessories* court may have been driven to create the narrow 'actual control' exception to the general rule that independent contractors hold the copyright under the 1976 Act by the fact that on appeal the defendant more or less conceded infringement but tried to escape liability on 'work for hire' grounds. *Easter Seal*, 815 F.2d at 333.

because Reid was an independent contractor and not CCNV's employee and the "sculpture surely is not a category of commissioned work enumerated in Section 101(2)," and, finally, "no written agreement existed between CCNV and Reid." *CCNV*, 846 F.2d at 1494. (App. 19a).

Under the *Aldon* test there is a complete lack of predictability when determining ownership of copyright in a commissioned work. Under its application it cannot be known who owns the copyright in a commissioned work, whether it is a work for hire or not, until after the work is completed and a copyright challenge is made. It is only upon completion of the work that the parties will be in a position to ascertain whether enough "direction and supervision" has been exercised to change the creator's status from independent contractor to employee and the work into a work for hire. As CCNV acknowledges, the *Aldon* test requires the actual exercise of the right of direction and supervision. CCNV's brief at 33. Every determination of copyright ownership will therefore be based on a post-completion analysis of the hiring party's contribution. After-the-fact renegotiations of the terms and conditions of the initial agreement between the parties is a likely but unpalatable result.

The practical effects of this test are to undermine contractual agreements and disrupt normal business practices. The case before the Court is a vivid example of the failure and undesirable effects of the *Aldon* test. Respondent James Earl Reid was hired as an independent contractor to create a specially-commissioned work. At the time the parties came to an initial understanding of the terms of their agreement, there was no discussion of

work for hire or of an assignment of copyright. Mr. Reid created the sculpture as promised, believing during the entire process that he owned the copyright. Prior to casting he placed his copyright notice on the piece of art and later registered the copyright solely in his name. 2/3/87 Tr. 201 (Reid), *CCNV*, F. Supp. at 1456 (App. 33A). It was only after completion of the work that CCNV asserted copyright ownership as a result of its alleged direction and supervision, which it claimed evolved during the post-negotiation, creation period. The District Court's ruling allows Reid's independent status as well as his copyright in the sculpture to be stripped from him, without his knowledge and against his wishes.

As the Fifth Circuit stated, the rule of *Aldon Accessories* makes business arrangements exceedingly difficult. "Rather than making a relatively simple business judgment about whether the seller is an employee or independent contractor, and relying on 'work for hire' rules or arrangements for copyright assignments accordingly, buyers and sellers will have to predict in advance whether a buyer's 'actual control' over a given work will make it the 'author.' If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest they did not bargain for." *Easter Seal*, 815 F.2d at 333. "Because the 'work for hire' status turns on the actual control by the buyer with respect *to each work* (as the *Aldon Accessories* court makes clear), the outcome can vary even between the same buyer and same seller in a series of works produced together." *Id.*

B. The *Aldon* Test Violates The Rules Of Statutory Construction

1. One Should Interpret A Statute According To Its Ordinary Meaning

When interpreting the meaning of a statute one looks to the ordinary meaning of the words used. *See*, 4 Sutherland Stat. Const. Sec. 46.01 ("[t]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed,") and also, *Caminetti v. U.S.*, 242 US 470 (1961); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *U.S. v. Pennsylvania Environmental Hearing Board*, 584 F.2d 1273 (3d Cir. 1978); *Brastex Corp. v. Allen International, Inc.*, 702 F.2d 326 (2d Cir. 1983); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981). Nothing in the ordinary or common use of the term "employee" suggests the *Aldon* test's definition. The *Aldon* definition is a special definition unique to one subsection of the copyright law. No statutory basis to use its non-traditional definition is put forth by CCNV. It has no other application and no place in common usage.[7]

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[7] "One who questions the application of the plain meaning rule to a provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning." Sutherland Sec. 46.01. *See, Great Lakes Properties, Inc. v. City of El Segundo*, 561 P.2d 244 (Cal. 1977); *Tiernan v. Trustees of California State University and Colleges*, 655 P.2d 317 (Cal. 1983); *Anderson v. Black & Decker (U.S.), Inc.*, 597 F. Supp. 1298 (ED Ky 1984).

2. Every Word In The Statute Should Be Given Effect

Under the tenets of statutory construction, effect must be given, if possible, to every word, clause and sentence of a statute. *See, U.S. v. Menasche,* 348 U.S. 528 (1955), cited in Sutherland sec. 46.06. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, *King v. Alaska State Housing Authority,* 633 P. 2d 256 (Alaska 1981); *Office of Consumers Counsel, State of Ohio v. Federal Energy Regulatory Commission,* 783 F.2d 206 (D.C. Cir. 1986), void or insignificant, and so that one section will not destroy another . . . ". *See,* Sutherland sec. 46.06.

Aldon violates the above doctrine by disregarding the entire second portion of section 101(1). To find a work for hire by an employee, the statute also requires that the work created be created "within the scope" of an employee's employment.[8] The *Aldon* test apparently permits the scope of employment to be ignored. Under that test, if there is sufficient supervision and direction of the creator by the hiring party there is no requirement or provision to determine whether the process was within the scope of employment. There, a supervised and directed creator is presumed, without an actual showing, to be acting within the scope of his or her employment. Accordingly, where all creations resulting from supervised and directed creators are automatically works for

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[8] 17 U.S.C. section 101. "A work made for hire is: (1) a work prepared by an employee within the scope of his or her employment. . . ."

hire, the second prong of section (1) is rendered superfluous. Such an approach contravenes Congress' attempt to accomplish through the inclusion of a scope of employment requirement, a clearer, more predictable doctrine.

C. The Aldon Test Has Been Overwhelmingly Rejected By The Vast Majority Of Scholars

The work for hire definition problem before the Court has attracted substantial scholarly attention. The approaches and conclusions advanced in the articles and comments vary, but nearly all of them support the proposition that the *Aldon* test is not a suitable vehicle for resolving the work for hire dilemma. The scholars have found *Aldon* to be unpredictable, unworkable, unsuitable, incorrect, and in violation of the legislative history and statutory construction.

See, for example, Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification,* 10 Hastings Comm/Ent L.J. 591 (1988) (the lack of a sound judicial interpretation of the "work for hire" doctrine, as evidenced by *Aldon* and its progeny, compels legislative reexamination of the statute); Fitzgibbon & Kendall, *The Unicorn in the Courtroom: The Concept of "Supervising and Directing" an Artistic Creation is a Mythical Beast in the Copyright Law,* J. Arts Mgmt. & L., Fall 1985 at 25 ("[u]nder *Aldon,* . . . the language of the new Copyright Act and the logic behind its restricted work for hire provision became casualties of judicial misunderstanding . . . "); Goldberg, *Works Made for Hire – A Copyright Quagmire,* N.Y.L.J., March 20, 1987, ("[i]t is difficult to

justify the application of 1909 reasoning in *Aldon* as anything but result-oriented"); Hamilton, *Commissioned Works as Works made For Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa L. Rev. 1281 (1987)("[b]eginning with the 1984 decision in *Aldon*, the Second and Seventh [*Evans Newton*] Circuits have embarked on a line of reasoning that threatens to undermine the legislative compromise represented by the 1976 Act's work-made-for-hire provisions") at 1295, (had the decision in *Aldon* not been followed by *Evans*, it "could be dismissed as an example of an appellate court reaching an equitable result by the easiest available reasoning, and its potential to upset the legislative compromise concerning commissioned works could be ignored") at 1303; Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. U.S.A. 210, 217 (April 1988) (examination of legislative history and conflicting case law reveals that *Aldon*'s interpretation of the work for hire doctrine is incorrect); Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857 (1987) ("[the *Aldon* court] "resolved the conflict [between the language of the 1976 Act and the Second Circuit's previously created definition] by cleaving to earlier doctrine and mangling the statutory language to fit") at 900, ("*Aldon* undermines the statutory effort to make copyright ownership more certain") at 901; Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 Arts Mgmt & Law 23, 37 (Fall 1987) ("[r]egardless of the *Aldon* court's motivation, its analysis of the work for hire question utterly disregarded the legislative history . . . "); 6 Patry, *Latman's The Copyright Law*, 123-24 (1986) ([*Aldon* has] "incorrectly viewed the provision of the first subdivision of the definition of work made for hire . . . as

continuing the common law presumptions developed under the 1909 Act and has thereby seriously upset the carefully crafted compromises enacted by Congress in the 1976 revision legislation"); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U.L. Rev. 373, 389 (1987) ([t]he *Aldon* court misapplied the literal terms of the 1976 Act"); Note, *The Works Made for Hire Doctrine of the 1976 Copyright Act After Aldon Accessories Ltd. v. Spiegel, Inc.*, 5 Cardozo Art & Ent. J. 265, 283 (1986) ("[o]ne of the major problems with the *Aldon* decision is the court's seeming disregard for the statutory language of Section 101 of the 1976 Act") at 283, ("[t]he court's holding . . . obliterates any distinction between employees and independent contractors, a distinction which is crucial to the works made for hire provision of the 1976 Act") at 280; Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976 – A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F.L. Rev. 649 (1986) ("[t]he court [in *Aldon*] appears to have improperly interpreted the [1909] Act case law and the [1976] Act legislative history") at 661, (" . . . *Aldon* has apparently broken down the [1976] Act's works made for hire dichotomy between employees and independent contractors") at 669.

D. The *Aldon* Test Permits Several Outcomes Which Are Antithetical To The Intentions Of The Statute's Framers And Would-Be Contracting Parties

1. The *Aldon* Test Violates the Idea/Expression Dichotomy of the Copyright Law

A generally recognized and uniformly accepted concept in the copyright law is the dichotomy between an

idea and its expression. *See, e.g., Baker v. Selden*, 101 U.S. 99 (1879). Ideas are not protected by copyright. 17 U.S.C. Sec. 102 (b). See, *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Hoehling v. Universal Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); 1 Nimmer, *Nimmer on Copyright* sec. 2.03(D) (1987). Only when an idea is expressed and fixed in a tangible form does it acquire protection under the copyright law. 17 U.S.C. Section 102(a). *Aldon* allows a copyright to vest in a hiring party who does no more than contribute ideas, disregarding the efforts and interest of the one who fixed the ideas into a tangible form.[9] A number of courts have avoided this pitfall and recognized that there must be more than the contribution of ideas in order to create a work for hire.[10] Unfortunately, however, some courts have fallen prey to

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[9] "Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to use his representational skills, rather than his original artistic vision, to execute it." *CCNV v. Reid*, 652 F. Supp. 1456 (1987). (App. 35a).

[10] *Kenbrooke Fabrics, Inc. v. Material Things*, 223 U.S.P.Q. 1039, 1045 (S.D.N.Y. 1984) (detailed ideas conveyed by the commissioning party to the independent contractor are not copyrightable and do not establish copyright ownership in the commissioning party); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F. Supp. 252, 259 (D. Neb. 1982) (contributing ideas, directing changes and exercising approval power at each stage of the development of a work is normally expected of a commissioning party and does not render that party the statutory "author"). *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981) (the architectural firm who had fixed "the ideas for the . . . home in a tangible medium, created those plans . . . ").

Aldon's simplistic yet faulty reasoning. These courts, such as the District Court below, have rendered decisions which contravene this fundamental copyright principle.

2. Works Created By Traditional Salaried Employees Could Be Deemed Not Works For Hire

CCNV specifically denies that the statute's use of the word "employee" means only "formal salaried employee".[11] Under the *Aldon* test a perverse result would be reached in the common situation in which a traditional, salaried employee works on a copyrightable project without any specific direction and supervision by his or her employer. Using the *Aldon* test, such a work created without the employer's direction and supervision, even if created within the scope of employment, would not be deemed a work for hire in the absence of actual direction and supervision. Works thus created would not be owned by the employer but by the employee. This outcome is at odds with the language, intent, and legislative history of the statute but is an inevitable result of the *Aldon* test.[12] Only by interpreting the term "employee" as used in Section 101(1) with two

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[11] Petitioner's brief at 40-43.

[12] While the *Aldon* test might deprive an employer of its rights under the work-for-hire doctrine, it can have the opposite and equally troubling effect of giving a non-employer commissioning party the benefits associated with employers, (i.e., ownership of a copyright as a work for hire), without any of the corresponding employer obligations and responsibilities.

meanings, one very expansive and one far more limited, can the above anomaly be avoided. No such dual approach to a single word is supported anywhere in the legislative history.[13] Indeed, the notion flies in the face of the accepted presumption that when a word is used in a statute, it has one meaning for all uses. *See, ICC Industries, Inc. v. U.S.*, 812 F.2d 694 (C.A. Fed. 1987). *See also,* Sutherland Sec. 46.06 ("[t]here is a presumption that the same [word] used twice in the same act has the same meaning"). While *Easter Seal* and the District Court below identified this problem,[14] neither Petitioners nor the *Aldon* court provides a solution or a basis for using differing definitions of the terms.

E. Summary

The *Aldon* court, faced with a difficult case, endeavored to achieve an equitable result. In the process, however, it misapplied the statute and developed a test which

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[13] House Committee on the Judiciary, Copyright Law Revision, H.R. Rep. No. 2237, 89th Cong., 2d Sess. 3, reprinted in Grossman, *Omnibus Copyright Revision Legislative History* (1976).

[14] "We think it safe to assume – because the contrary result would be almost unimaginable – that the Second Circuit would not apply the 'actual control' test to determine if an employer was the 'author' of works produced by actual employees within the scope of their employment." *Easter Seal*, 815 F. 2d at 334. "Doubtless, the *Aldon Accessories* court intended to apply the "actually sufficiently supervised and directed test only to determine whether independent contractors are employees. The copyrightable work of regular or formal employees is work made for hire without regard to the employer's exercise of control." *CCNV*, 846 F.2d at 1490 n.6. (App. 9a).

produces unworkable results, creates an environment of uncertainty and violates the tenets of statutory construction. The *Aldon* test should be rejected in favor of a test that provides predictability, abides by the rules of statutory construction and carries out the intent of Congress as shown through the legislative history of the Act.

II. TREATMENT OF THE TERM, "EMPLOYEE WITHIN THE SCOPE OF HIS OR HER EMPLOYMENT," AS MEANING A REGULAR SALARIED EMPLOYEE IS SUPPORTED BY THE NINTH CIRCUIT, THE U.S. COPYRIGHT OFFICE, AND MOST SCHOLARLY COMMENTARY, AND COMPORTS WITH RULES OF STATUTORY CONSTRUCTION AND WITH THE LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT

A. The Court of Appeals for the Ninth Circuit, Which Provides the Most Recent Opinion On The Work for Hire Issue, Joins the Federal Government and Voluminous Scholarly Commentary In Finding Section 101(1) Refers Only to Formal, Salaried Employees

The Ninth Circuit in *Dumas v. Gommerman*, 89 Daily Journal D.A.R. 501 (9th Cir. 1989) ("*Dumas*"), the U.S. Copyright Office[15] and numerous commentators[16] on the 1976 Copyright Act, 17 U.S.C. Section 101 *et seq.*, all support an interpretation of the term, "employee within the scope of his or her employment," as contained in the work for hire definition, that is strikingly different from

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[15] *See amicus* brief of the U.S. Copyright Office; *see also amicus* brief of The Copyright Justice Coalition.

[16] See discussion of selected articles, *infra*.

that found by the *Aldon* court. Under this interpretation, an "employee" is an individual hired by another at a regularly paid salary to work over a long, indefinite time period and often entitled to employee benefits such as health insurance, paid vacation, sick leave, and retirement. In short, this definition is what most people understand "employee" to mean.

The advantages of such a definition are compelling; it is understood by virtually everyone, without resort to legal terminology. It provides predictability and certainty as to copyright ownership from the beginning of a work for hire relationship. It is applicable to the vast majority of work for hire situations; "where the artist holds himself . . . out as a freelancer, the employer should anticipate that the commissioned work will not be a work for hire under Section 101(1)."[17] Moreover, the *Dumas* interpretation gives to the first part of the "work-for-hire" definition the same treatment accorded part (2), "a work specially ordered or commissioned". The ordinary meaning routinely given a "commissioned work", a work prepared by an independent contractor for another party pursuant to a contract, has engendered little controversy or litigation, because that meaning is clear and widely understood and accepted.

The *Dumas* opinion, filed January 13, 1989, is the latest circuit court view of the work for hire issue. The

[17] For those very limited situations where this definition does not resolve all questions, an agency-type analysis would still be available to the courts. *See, e.g., Dumas*, 89 Daily Journal D.A.R. at 506.

court found that the first part of the work for hire definition, Section 101(1), refers only to formal, salaried employees, and Section 101(2) applies only to the nine types of enumerated commissioned works where there is also a written agreement that the work in question is to be a work for hire. This case involved a dispute over the ownership of copyrights in four original paintings created by Patrick Nagel, the late husband of Jennifer Dumas, the plaintiff-appellee. The defendants, an art gallery and its owner, Gommerman, appealed from a grant of a preliminary injunction restraining them from reproducing and marketing the art work in which both parties claimed copyright. The art work had been produced under contract with an advertising agency for its client, ITT Canon, to give away as sets of lithographs in what turned out to be an unsuccessful promotional campaign. The contract did not mention work for hire or copyright. ITT Canon threw away the original art and later sold the leftover lithograph sets and any copyrights in the works it might hold to Gommerman, who registered the works in his name. Dumas also claimed copyright and sought and received the preliminary injunction preventing Gommerman from exploiting any rights in the works.

The Ninth Circuit reasoned that the structure of the two-part work for hire definition in 17 U.S.C. Section 101 was maintained by Congress in passing the 1976 Act because it did not want to disturb the compromise agreed to in 1965 by the creators and marketers of copyrightable works. Under that compromise, works made for hire would not be subject to the artist's right to terminate a transfer of copyright after 35 years. "In exchange, the old tests under the 1909 Act, which favored employers,

would be replaced by a new definition distinguishing works prepared by employees within the scope of their employment from works prepared on commission." 89 Daily Journal D.A.R. at 504.

Commentary on the 1976 Act also supports the notion of "salaried employees." *See, e.g.*, Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 Hastings Comm/Ent L.J. 591, 619 (1988) (Senator Cochran's recent proposal to qualify "the definition of 'work prepared by an employee within the scope of his or her employment' by adding a phrase allowing the category to apply only where the 'employee' is provided with full benefits and incidents of employment according to applicable state and federal law, including withholding taxes" . . . "represented a better-focused attempt to resolve the uncertainties left after the *Aldon* decision"); Galley, *Authorship and Copyright of "Works Made for Hire": Bugs in the Statutory System*, 8 Art & Law 573, 581 (1984) (the term "employee" under both the 1909 and the 1976 Acts refers to salaried employees); Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa L. Rev. 1281, 1313 (1987) (defining "employee" as "one who receives employment benefits required by law and one whose employer withholds taxes from salary" would prevent results similar to the *Aldon* court's "transformation of works by types of independent contractors not listed in subdivision (2) into subdivision (1) employee works . . . "); Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. 210 (April 1988) ("[t]hroughout the studies, the reports, the

discussions, and the hearings, the comments of nearly every participant showed an understanding that 'employment' meant formal, salaried employment; nothing from Congress either in the language of the Act or in the committee reports has ever suggested otherwise") at 222-23, (the most "satisfactory test of employment is that of regular, formal employment – exactly what lay persons would think 'employment' means, and exactly what every major participant in the discussions of copyright revision meant when using the term") at 258; Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 890 (1987) (" . . . the content of the pre-legislative dialogue and the context in which it occurred indicate that by using the term 'employee' the parties meant to limit works made for hire under this branch of the definition to works created by a salaried worker in a long-term position"); Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 Journal of Arts Mgmt & Law 23, 26 (Fall 1987) ("Clause [1] of [the definition of work-for-hire] adhered to the well-established principle that works created in the course of a salaried employee's employment should be treated as works for hire under federal copyright law"); 6 Patry, *Latman's The Copyright Law*, 118-25 (1986) (the phrase "within the scope of employment" contemplates only formal, salaried employees); Comment, *Free Lance Artists, Works for Hire, and the Copyright Act of 1976*, 15 U.C. Davis L. Rev. 703, 708 (1982) ("[t]he New [1976] Act codifies prior law by providing that a work prepared by a salaried employee within the scope of her employment is a work made for hire"); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U.L. Rev.

373, 378 (1987) ("[e]ven before the passage of the 1909 Act, the Supreme Court recognized that an employer is entitled to own the work of his salaried employees"); Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976 – A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F.L. Rev. 649, 666 (1986) (" . . . there are indications in the legislative history that subdivision (1) of the works made for hire definition should include only salaried employees").

B. Under The Rules of Statutory Construction, Ordinary Words In A Statute Are Given Their Ordinary Meaning; Therefore, The Word, "Employee," Which Appears In Section 101(1) of the 1976 Copyright Act, Means A Salaried Employee

In the absence of a statutory definition, "the general rule is that popular . . . import of words furnishes the general rule for the interpretation of public laws." *Deputy v. duPont*, 308 U.S. 488, 493 (1940). Words of statutes should be interpreted where possible in their ordinary, everyday senses. *Malat v. Riddell*, 383 U.S. 569, 571 (1966).

Thus, the word "employee," which is not defined in the 1976 Copyright Act, should be given its plain, everyday meaning. One dictionary in 1972 defined "employee" as "[a] person hired by another, or by a business firm, etc., to work for wages or salary." Webster's New World Dictionary, Second College Edition, 1972, at 459.

There is authority to the effect that where a term has a settled legal meaning, the courts may infer that that is the meaning the legislature intended. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), *reh'g denied*, 453 U.S. 950. At

least arguably, therefore, the agency definition of "employee"[18] could be incorporated into the 1976 Copyright Act. However, a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Certainly, the *Aldon* "supervision and direction" test to determine employment status has no settled legal meaning.

Moreover, where one of several possible interpretations of a statute produces an unreasonable result, that interpretation should be rejected in favor of one that would produce a reasonable result. *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985), quoting Sutherland Section 45.12. As set out earlier in this brief,[19] the *Aldon* "supervision and direction" test to determine employment status enables a commissioner of a work not mentioned in Section 101(2) to gain ownership of the copyright in the work merely by exercising supervision and control at some stage of the project. In contrast, the "salaried worker" definition of "employee" is clear, simple to apply, and conclusive at the outset.

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[18] Section 220, Restatement of Agency. *But see NLRB v. Hearst Publications*, 322 U.S. 111, 120 (1944), suggesting there is no "simple, uniform and easily applicable" common law test to distinguish between employees and independent contractors.

[19] *See supra*, Part I of Argument.

C. The Legislative History of the 1976 Copyright Act Makes It Clear that Participants In The 20-Year Revision Process Assumed The Term, "Employee," Meant A Regular, Salaried Employee

Courts may consider extrinsic aids to interpret statutory language even when the language is plain. *Foulkes v. Commissioner of Internal Revenue*, 638 F.2d 1105 (7th Cir. 1981). Extrinsic aids consist of certain background information that comprises the history of a statute. *Sutherland Section 48.01*. It would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 697 (1980), in *dicta*.

In this case, however, the legislative history fully supports the view that the ordinary and commonly accepted meaning of "employee" is a regular salaried worker. As there is no bar to examination of legislative history when the meaning of a term is clear, a brief review of the relevant legislative history follows.

The revision process that culminated in the 1976 Copyright Act, which replaced the Copyright Act of 1909, 17 U.S.C. Section *et seq*. (1970), began in 1955. In that year and for the next three years, Congress provided funds for a comprehensive program of research and studies by the Copyright Office. One of the studies that came out of this effort reviewed works made for hire and on commission. Study No. 13, *Works Made For Hire and On Commission*, by Borge Varmer, 1958, ("Varmer"). Borge Varmer concluded from a review of case law that the 1909 Act, which did not address commissioned works at all, referred only to

salaried employees producing works for hire. Varmer at 130. It was Varmer who proposed the definition of "works made for hire" ("works created by an employee within the scope of his employment") that remained virtually unchanged throughout the revision process. Varmer at 141.

Although Varmer suggested that if the employment-for-hire rule was not to include commissioned works, the definition might further specify "employment on a salary basis," *id*., Congress chose a different approach. In various draft bills introduced over the course of the 20-year revision process several interpretations were proposed. Congress initially specifically excluded commissioned works from the works-made-for-hire definition. Later commissioned works were included where the parties so agreed in writing. And in 1965 Congress divided the definition into two sections, the first dealing with employees and the second, with specified commissioned works, the number of categories of which changed in different proposals.[20] (The 1976 Act contains nine such categories. 17 U.S.C. Section 101(2).)

In 1961, the Copyright Office issued its first report containing tentative recommendations to revise the 1909 Act. *Report of the Register of Copyrights on the General*

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[20] *See Copyright Law Revision, Part I, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 1961; *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments*, 89th Congress, 1st Session, September 2, 1965; *Hearings on H.R. 4347, H.R. 5680, H.R. 6831 Before Subcommittee No. 3 of the Committee of the Judiciary, 89th Congress, 1st Session, Serial No. 8, 1965.*

Revision of the U.S. Copyright Law, 1961. The report suggested that works-made-for-hire should not include commissioned works because case law did not support such a view. It said that a work made for hire should be defined as a work "created by an employee within the regular scope of his employment". *Id.*, at 86, 87. Barbara Ringer, then Assistant Register, stated that with respect to works-made-for-hire, the report would "leave the present law [the 1909 Act] undisturbed." *Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, February 1963, 88th Congress, 1st Session, at p. 144.

Between 1962 and 1965, the issue of work for hire was extensively debated before Congress.[21] The concern of the participants (representatives of motion pictures, music companies, publishers, artists, composers, and authors), however, centered on what types of works, if any, should be included under the "commissioned works" part of the definition. Intense emotions arose over the treatment of commissioned works, fueled by a proposed "reversion" clause (17 U.S.C. Section 204) under which transferred and licensed copyrights, but not those associated with works for hire, could revert to the original creator after a period of years. Motion picture producers, the music industry, and publishers of textbooks and reference works were concerned that if they were not

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[21] *See generally* G. S. Grossman, *Omnibus Copyright Revision Legislative History*, 1976, Vols. 1-17, (contains all the Congressional Committee prints of the revision process from the first Copyright Office studies funded initially in 1955 through H.R. Report No. 94-1476, which accompanied the 1976 Act).

designated the authors of works that required the contributions of a number of individuals, the legal complications would be immense and the copyright laws of other countries would undermine their ability to market their product. On the other hand, organizations representing individual writers and artists feared that these individuals could be forced to sign away their copyrights because of their inferior bargaining power. Screenwriters also urged adoption of a patent-law "shop rights" approach whereby employees retained all rights in their works except those that the employer required to conduct its business, a suggestion Congress did not adopt. *See* Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. U.S.A. 210, 236-40 (1988); *House Report 89-2237*, October 2, 1966, at 114-116.

Finally, in April 1965, the two sides agreed to a compromise: eight categories of commissioned works could be considered works for hire. That 1965 compromise agreement was enacted into the 1976 Act, with only one change – the category of "answer material for a test" was added to the list. *H.R. Rep. 89-2237* at 116.

Unlike the sometimes fiery debate over "commissioned works," virtually without exception participants in the revision process used the term "employee" to mean a regular, salaried employee.[22] No matter which side of

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[22] Only one participant suggested that the definition of "works made for hire" use the terms, "master" and "servant." The Register of Copyrights rejected those terms as "medieval." *Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright and Discussion and Comments on the Draft*, 1964, p. 273. Never in all the hearings, reports, studies is the definition set forth in *Aldon* proffered.

the work for hire issue the parties were on, their oral and written comments consistently showed that they distinguished between a regular, salaried employee and all other types of working relationships.

See, e.g., Copyright Law Revision, Part 2, Discussion and Comments on Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, February 1963, 88th Congress 1st Session: " . . . a man who comes in and works for you, is employed on a week-to-week basis . . . ". " . . . an employer who meets a weekly payroll . . . ". " . . . he can write on speculation, he can come in and give you his finished product, instead of sitting down week by week and drawing weekly compensation . . . " (pages 153-155). *Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comment on Draft, 1964*: " . . . the necessity of putting people on the payroll whom the employers would not want to put on the payroll, and where the employees would prefer to work as independent contractors" (page 258-259). " . . . the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job" (page 260). " . . . their comptrollers and accountants start going into a real tailspin the minute they start seeing the word, "employee," because this means social security, withholdings, and all the other attendant mechanical housekeeping tasks" (page 267). "It might be helpful not to restrict a work made for hire to the technical employer-employee relationship" (page 321). Objecting to the exclusion of commissioned works from the definition: "It is neither practical or possible to hire these specialists as

employees on a full-time basis" (page 340). *Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 of the Committee of the Judiciary, 89th Congress, 1st Session, Serial No. 8, 1965*: " . . . employee for hire, as well as a party who specifically orders or commissions a work . . . as if it were an ordinary employment for hire relationship" (page 264). "If authors increasingly turn toward employment, it will ordinarily be a matter of necessity rather than preference. The employer, who will commonly pay far more for a restricted right to use a work when acquired from an independent author, should not be permitted to swallow up the authorship status when the work results from employment" (page 275). " . . . there is still the possibility that publishers can use this provision to pressure authors to become employees rather than work for royalties" (page 446). " . . . what we are thinking primarily of is the independent author . . . not the work made by a staff employee or a worker employee under the usual acceptation of the term of a work made for hire" (page 166).

Beginning in 1965, the copyright revision process turned to other copyright issues, including the emerging copyright areas of cable television and sound recordings.[23] The work for hire issue, except for fine-tuning the categories in Section 101(2), apparently was settled.

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[23] *See*, the 1965 remarks of the then-Register of Copyrights Al Kamenstein that the copyright revision process still had five major areas to work out. Work for hire was not among them. *Hearing Before the Subcommittee on Patents, Trademarks, and Copyright of the Committee of the Judiciary*, U.S. Senate, 89th Congress, 1st Session, August 1965, at 68.

As the Ninth Circuit points out in *Dumas*, 89 Daily Journal D.A.R. at 503, the legislative history of the 1976 Act shows hard-fought negotiations between the creators and marketers of copyrighted works. These interest groups, at the behest of Congress and the Copyright Office, developed a "virtual contract" that became the 1976 Act. Since many of the Act's provisions, including the work for hire sections, affect only these two groups, Congress clearly intended that the Act reflect the negotiated compromises, and that the terms in the Act would mean what the negotiators intended at that time. *Id.* The 1965 compromises – the separation of the definition of work for hire into two sections, one for employees and one for independent contractors; the rejection of a patent law "shop rights" concept for works created by employees; and the limitation, in the second section, of commissioned works that can be works-for-hire to nine categories – reflected the participants' understanding that the term, "employee," referred to a salaried worker and excluded freelance workers entirely. *Id.* This same understanding was intended by Congress a decade later when, without further debate, it enacted the work for hire provisions of the 1976 Copyright Act.

At the time of the work for hire discussions, the law was clear. Only *salaried* employees were considered employees for work for hire purposes. For commissioned works, the law presumed that the independent contractor assigned the copyright to the commissioner of the work. *Altman v. New Haven Union Co.*, 254 Fed. 113 (D.C. Conn. 1918), *Yardley v. Houghton Mifflin Co., Inc.* 108 F.2d 28 (2d Cir. 1939).

It was only after Congress had settled the work for hire issue in 1965 that the courts began to blur the distinction between employees and independent contractors.[24] However, at the time it passed the 1976 Act, Congress made no comment on the then-current state of the case law; rather, it referred back to the compromises of 1965 with approval.[25]

D. Respondent Reid Was Never A Salaried Employee Of The Community For Creative Non-Violence, Nor Was His Sculpture One Of The Types Of Commissioned Works That Can Be A Work For Hire

CCNV commissioned Reid, a skilled sculptor, to create a statue of a modern nativity scene. At no time during the seven-week project was Reid on CCNV's payroll. In

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[24] *See*, for example, *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2nd Cir 1966) (holding that the statutory 1909 work for hire doctrine should apply to independent contractors as well as employees); *see also Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972); *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909 (2d Cir. 1974); *Murray v. Gelderman*, 556 F.2d 1307 (5th Cir. 1978).

[25] "The work-made-for-hire provisions of this bill represent a carefully balanced compromise." Congress rejected the "shop right" doctrine called for by screenwriters and composers for motion pictures, whereby an employer would acquire from his employee only those rights needed to conduct his business; the employee would retain all other rights in the work. It adopted the compromise worked out in 1965 regarding the specially ordered or commissioned works that can be works-for-hire. *House Report No. 94-1733*, Sept. 29, 1976, p. 121.

fact, Reid was not paid anything, as he donated his time and talent. *See supra*, Statement of Facts.

As the Court of Appeals below stated in a somewhat different context, but equally applicable here, " . . . we think it evident that Reid was not CCNV's employee, nor do we understand CCNV to contend otherwise." *CCNV*, 846 F.2d at 1494 n.11. (App. 19a).

Since the beginning of this litigation, Respondent Reid has stated that he was not an employee of CCNV and that the sculpture CCNV asked him to create was not covered by any of the categories of 17 U.S.C. Section 101(2), and thus was not a work for hire. *Id.* at n. 10. He respectfully urges this Court, for the reasons set forth herein, to find that he was not CCNV's employee, that his sculpture is not a work for hire, and that he owns the copyright in that sculpture.

III. THE *DUMAS* "FORMAL, SALARIED EMPLOYEE" TEST PROVIDES PREDICTABILITY AND IS SUPPORTED BY RULES OF STATUTORY CONSTRUCTION AND BY THE LEGISLATIVE HISTORY OF THE 1976 ACT; HOWEVER, IF THIS COURT DOES NOT EMBRACE *DUMAS*, THE *EASTER SEAL* AGENCY TEST PROVIDES FAR MORE PREDICTABILITY THAN THE *ALDON* "SUPERVISION AND DIRECTION" TEST AND IS NOT OFFENSIVE TO STATUTORY CONSTRUCTION OR THE LEGISLATIVE HISTORY, AS THE *ALDON* TEST IS

Respondent Reid believes that the best definition of work for hire employee is the "formal, salaried" employee as recently enunciated by the *Dumas* court, *supra*. However, should this Court decline to adopt that

test, we respectfully request that it uphold the court below, rejecting the *Aldon* test and making the *Easter Seal* test the appropriate method to use to determine an employment relationship.

A. The *Easter Seal* Test Provides Greater Predictability Than The After-The-Fact *Aldon* Test

The *CCNV* court explains the *Easter Seal* test as follows:

> Summarily stated, that interpretation reads section 101 as a reflection of a simple dichotomy in fact between employees and independent contractors. In other words, a court should first determine – using agency law rules – whether or not the seller is an employee or an independent contractor. Then, the court should apply the statute. Section 101(1) applies to sellers who are employees. If the work was in the scope of employment, an agency-law employee is a copyright employee, and the employer is the "author." Section 101(2) applies to independent contractors. All works by independent contractors – "work[s] specially ordered or commissioned" – are *not* works for hire unless the work comes within the nine narrow statutory categories *and* parties agree in a signed instrument. Section 101(2) is really statutory *permission* for certain kinds of independent contractors to give "authorship" to their buyers. Id. at 329 (footnote omitted). *CCNV*, 846 F. 2d at 1492. (App. 13a).

"We conclude," the court below said, that the "1976 Act has greatly restricted the scope of the 'work for hire' doctrine." *CCNV*, 846 F.2d at 1485. Unlike the *Aldon* test which expands the categories of works for hire to virtually any work except those in Section 101(2) without a writing, the *Easter Seal* test applies common-law agency

guidelines selectively to determine employment status.[26] Using the indicia suggested by Section 220 of the Restatement, and perhaps additional factors relevant to each individual situation, the parties at the beginning of their relationship would reliably determine their employment status. These specific indicia, unlike the rudderless "supervision and direction" *Aldon* test, provide a framework in which to make that determination.

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[26] Restatement (Second) of Agency:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(Continued on following page)

Moreover, "this interpretation ties the meaning of work for hire to a well developed doctrine in agency law. Although there is no general federal agency law and adopting state agency law would not give copyright law the requisite national uniformity, federal courts can turn to early copyright cases before the encroachment of the *Yardley* rule, and to the general principles embodied in the Restatement of Agency Law, in order to make considered decisions in work for hire adjudication . . . this approach gives buyers and sellers the greatest predictability. In most situations it will not be difficult for a buyer and seller to determine whether the seller is an employee or an independent contractor and to structure their contractual relations accordingly." *Easter Seal*, 815 F.2d at 335.

Thus, the *Easter Seal* agency test provides a workable alternative to the *Dumas* test. Certainly, it is preferable to the open-ended *Aldon* test, under which employment relationships could change in the course of a project, turning independent contractors into employees without their consent.

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(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

B. The Legislative History Supports the *Easter Seal* Court's Finding That Congress Intended to Broaden The Rights of Creators In Enacting Section 101(1) and (2)

The Court below correctly noted and found the legislative history clear in its exclusion of independent contractors from the meaning of "employee" and the broadening of protection and rights for creators, citing with approval various scholarly commentary. See, for example, A. Latman, R. Gorman, & J. Ginsburg, *Copyright For The Eighties: Cases and Materials* 242 (1985) ("[d]id the [*Aldon Accessories*] court improperly blur an attempted statutory distinction between works created by 'employees' and specially ordered or commissioned works,' a distinction designed by Congress to give commissioned persons greater copyright ownership rights than they had under the 1909 Act cases?"); Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 Hastings Comm/Ent L.J. 591 (1988); Hamilton, supra, at 1292-93 ("[f]rom a preliminary draft that excluded all commissioned works from the work-made-for-hire rubric, the copyright law revision developed into a final bill wherein only certain, specified categories of commissioned works could be considered as works made for hire.") (footnote omitted).

In recognizing the "bright line" between employees and independent contractors, the *Easter Seal* agency test maintains the dichotomy created by subsections (1) and (2) of Section 101. *Easter Seal*, 815 F.2d at 329, 335.

C. The *Easter Seal* Test Provides a Logical Distinction Between Section 101's Subdivisions (1) and (2) And Provides a "Moral Symmetry"

The Fifth Circuit in *Easter Seal* found that the agency approach "makes sense out of the nine narrow categories in Section 101(2)" and creates a logical distinction between subsection 101(1) and 101(2) of the statute. The Court questioned:

> Why does an author of answer material for a test get special protection from the traditional expansive "work for hire" doctrine when a musician or a sculptor does not? The activities in section 101(2) look like the kind of activities where the buyer normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project. It would be anomalous to give these activities special protection beyond those accorded other types of commissioned works.

Easter Seal, 815 F.2d at 331. *Easter Seal* interprets Section 101(2) as "statutory *permission* to allow certain kinds of independent contractors to sign away their authorship to their buyers." *Id.* at 335. This logical approach allows for a plain reading of the statute.

The court in *Easter Seal* found that "adopting an agency definition of copyright 'employment' creates a certain moral symmetry making a buyer a statutory 'author' only if under agency law he or she would be responsible for the negligent acts of the seller." *Easter Seal*, 815 F.2d at 335. Here, according to the *Easter Seal* court, a buyer will only be the "author" of a writing, for instance, if he or she "would be liable under respondeat superior in a defamation action based on that writing."

Adopting *Easter Seal*'s agency law approach would prevent situations where a party could reap the benefit provided to employers under copyright law without also assuming the responsibilities that an employer must bear under other areas of the law.

IV. NO REMAND TO THE DISTRICT COURT IS NECESSARY TO DETERMINE WHETHER REID WAS AN EMPLOYEE UNDER AGENCY LAW BECAUSE THE UNDISPUTED FACTS, AS FOUND BY THE DISTRICT COURT, ADMIT OF NO OTHER CONCLUSION

CCNV argues that because the Court of Appeals found that the agency law standard was the correct standard to determine the employment status of Reid, that court should have remanded this case to the District Court for a factual determination of the issue. CCNV's Brief at 36.

However, as CCNV concedes, even where the wrong legal standard has been applied, no remand is necessary where the record supports only one resolution of the factual issue. CCNV's Brief at 37. *Pullman-Standard, A Division of Pullman, Inc. v. Swift*, 456 U.S. 273 (1982). Reid submits that application of either the *Easter Seal* agency test or the *Dumas* formal, salaried employee test to the facts as identified by the District Court can result in only one holding: Reid was not an employee of CCNV.

Should this Court determine that the *Dumas* formal, salaried employee test is the proper test and because it is instantly apparent and uncontested that Reid was not such an employee of CCNV, a remand would be unnecessary.

As for the *Easter Seal* agency test, the record in this case is fully developed and for the purposes of the appeal was uncontested. The appellate court thus had a full and uncontested record from which to evaluate the case. It specifically states that it conducted a review under the terms of the Restatement of Agency[27] and found that Reid was not an employee. There were clearly enough facts before the court to allow it to arrive at its ruling. The court, at *CCNV*, 846 F.2d 1494 n.11 (App. 19a), by way of illustration cites four of the criteria it used in its analysis. A simple review of the facts and the Restatement show that under agency rules only one result can be forthcoming.

Furthermore, the two primary cases relied upon by CCNV to support its claim for a remand – *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) and *Pullman-Standard, supra*, are clearly distinguishable from the facts here.

In *Kelley*, a Federal Employers Liability Act (FELA) case, the court of appeals reversed the district court on the grounds that it used the wrong legal standard, "agent" rather than "servant", to find FELA liability. This Court remanded the case to the District Court so it could "re-examine the record in light of the proper legal standard." *Kelley*, 419 U.S. at 332. This Court noted that the district court apparently had specifically considered but rejected proposed findings tending to show *Kelley* was, in

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[27] *See supra*, at note 26.

fact, a servant for FELA purposes. *Kelley*, 419 U.S. at 325, n. 6.

In our case, there is no indication that the District Court specifically excluded proposed findings that would tend to show Reid was not an agency employee. In fact, for the purposes of his appeal, Reid did not contest the factual findings of the District Court. There simply is no need to re-examine the record here.

Pullman-Standard, supra, is a Title VII discrimination case in which the appeals court reversed the district court and found that there was an intent to discriminate. This Court reversed and remanded to the district court, ruling that discriminatory intent is a factual finding requiring remand to the trier of fact. 456 U.S. at 293.

In *CCNV*, in contrast, the D.C. Circuit Court made no additional factual findings, but relied solely on the findings of the court below.

Not only are *Kelley* and *Pullman-Standard* not applicable to the facts in our case, but the District Court's findings fully support the conclusion that Reid was not an employee of CCNV under either the *Dumas* or *Easter Seal* test.

V. CCNV'S ARGUMENT REGARDING JOINT AUTHORSHIP IS NOT BEFORE THE COURT

In its brief, CCNV argues a fictional fractionalization problem it believes inherent in joint authorship. The issue of joint authorship has been remanded to the District Court and will be appropriately dealt with there and is not before this Court.

However, it should be noted that the concept which CCNV finds so disruptive – joint authors joining in the copyright of works in whose creation they participated – is statutorily provided for in 17 U.S.C. 101.

Further, as a point of clarification, the holding of the Court below did not remand this case for determination as to whether Reid's twelve assistants were joint authors nor did it implicitly recognize that CCNV deserves to be a joint author. Rather, it remanded for a determination of whether anyone had a right to claim joint authorship. CCNV, 846 F.2d at 1499 (App. 28(a)).

Finally, it is quite hypocritical for CCNV to come before this Court and argue that for artists to be able to make-an-after the-fact claim of joint authorship in a work is disruptive, yet seek to reserve for themselves the after the fact right to claim copyright ownership under the work for hire doctrine. Like the remainder of CCNV's arguments, this argument also must be rejected.

CONCLUSION

The Court of Appeals was correct in finding that James Earl Reid was not a work for hire employee under 17 U.S.C. Section 101 and its finding should be affirmed. The formal salaried employee test as set forth in *Dumas* is the correct one for determining who is a work for hire employee. However, as between the remaining alternate tests of *Easter Seal* and *Aldon*, the preferred approach is *Easter Seal*. Finally, under neither a *Dumas* nor *Easter Seal* analysis would a remand be necessary.

Respectfully submitted,

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